IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

NO. 79-711

STATE OF ALABAMA,

PETITIONER

VERSUS

JAMES G. DAVIS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
Attorney General of Alabama

CAROL JEAN SMITH
Assistant Attorney General
of Alabama
250 Administrative Bldg.
64 No. Union Street
Montgomery, Alabama 36130
205-834-5150

COUNSEL FOR PETITIONER

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, the State of Alabama, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit

entered in this proceeding on June 13, 1979, rehearing having been denied on August 6, 1979.

OPINIONS OF THE COURTS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming the respondent's appeal from his conviction for murder is reported as: Davis v. State, 53 Ala. App. 598, 302 So.2d 571 (1975). Certiorari was denied by the Supreme Court of Alabama on April 25, 1975 but is unreported. (R.Vol.I, p. 10) The denial of a subsequent petition for writ of error coram nobis was affirmed by the Court of Criminal Appeals of Alabama on February 18, 1975, but is unreported. (R.Vol.I, p.292)

The first order of the District Court denying the writ of habeas corpus is not reported, but was styled: Davis v. Alabama, C.A.75-A-0303NE (N.D.Ala. 1975)(Appendix A).

The decision and opinion of the United

States Court of Appeals for the Fifth Circuit affirming in part, reversing in part the above decision of the District Court is reported as follows: Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977). (Appendix B)

The subsequent order of the District Court denying the writ of habeas corpus as to the issue which was remanded is not reported, but was styled: Davis v. Alabama, C.A. 75-A-0303NE (N.D.Ala. 1977).(Appendix C)

The decision and opinion of the United States Court of Appeals for the Fifth Circuit reversing and remanding for a further hearing is reported as follows: Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979). (Appendix D)

Rehearing and rehearing en banc were denied on August 6, 1979 (Appendix E).

JURISDICTION

The decision, opinion and judgment of the United States Court of Appeals for the Fifth Circuit was issued on June 13, 1979. A timely application for rehearing was denied by the said Court of Appeals on August 6, 1979 and this petition is filed within ninety (90) days of said date.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May federal courts, in exercising jurisdiction pursuant to 28 U.S.C. 2254, sua sponte decide issues not raised by the convict or his counsel?

2. To what extent may the error or omission of a defense lawyer - retained or appointed - be reviewed by the federal Writ of Habeas Corpus where there is no state action?

3. May the effectiveness of counsel be

judged by a standard other than "reasonably likely to render and rendering reasonably effective assistance"?

CONSTITUTIONAL PROVISIONS INVOLVED

A.

The Sixth Amendment to the Constitution of the United States, in particular the provision relating to the right to counsel:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

B.

The Fourteenth Amendment to the Constitution of the United States, Section One:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

28 United States Code Section 2254, the same being submitted as Appendix "F" to this petition.

STATEMENT OF THE CASE

A.

Course of Proceedings and Disposition of Case in Court Below

Mr. Davis was indicted on November 2, 1973

for first degree murder. (R.Vol.I, p.48) He was lawfully convicted in the Circuit Court of Cullman County, Alabama on November 28, 1973. (R.Vol. I, p.63) Davis was sentenced to imprisonment in the state penitentiary for life. (R.Vol.I, p.64) He is presently on parole.

Davis' conviction was affirmed on appeal to the Court of Criminal Appeals of Alabama. Davis v. State, 53 Ala. App. 598, 302 So.2d 571 (1975). His Petition for Writ of Certiorari was denied by the Alabama Supreme Court on April 25, 1975. (R. Vol.I, p.10, unreported) The denial of a subsequent Petition for Writ of Error Coram Nobis was affirmed by the Court of Criminal Appeals of Alabama on February 18, 1975. (R.Vol.I, p. 292)

The instant proceedings were initiated when Mr. Davis filed this his third petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 in federal district court. (R.Vol.I, p.2) On December 9, 1975, the Honorable C. W. Allgood, United

States District Judge, issued an order denying the present petition for habeas corpus filed by James G. Davis. (R.p.300)(Appendix A) Judge Allgood by order dated January 27, 1976 issued the certificate of probable cause. (R.Vol.I, p.305).

On January 14, 1977 the Court of Appeals for the Fifth Circuit affirmed in part, reversed in part. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977). (Appendix B) This Honorable Court denied certiorari on those issues which had been affirmed by the Court of Appeals. 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

Pursuant to the order of the Court of Appeals this case was remanded to the district court to determine if denial of the continuance deprived petitioner of effective assistance of counsel. Davis, 545 F.2d at 467, supra. In compliance with the mandate of the Court of Appeals, an evidentiary hearing was held in the district court before Judge Nelson, the United States

Magistrate, on July 13, 1977. (R.Vol.II, p.1) On October 4, 1977 the petition for habeas corpus was granted by Judge C. W. Allgood. (R.Vol.I, p. 333) On the Court's own motion, the Judgment was stayed and on December 13, 1977 the petition was denied. (Appendix C)(R.Vol.I, pp.334-339) The certificate of probable cause was issued on January 12, 1978. (R.Vol.I, p.341)

On appeal the Court of Appeals affirmed the decision of the District Court in denying relief on the sole issue which had been remanded to the District Court. Nonetheless, the Court of Appeals held that Davis' counsel had been ineffective and remanded the case to the District Court to determine whether Davis had been prejudiced by the conduct of his attorneys. This decision of the Court of Appeals was issued on June 13, 1979 and is reported as Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979). (Appendix C) Petition for rehearing and rehearing en banc was denied on

August 6, 1979. (Appendix E)

B.

STATEMENT OF THE FACTS

On November 26, 1973, the first day of the state court trial, attorneys for Petitioner presented a Petition for Mental Examination and made an oral Motion for Continuance. (R.Vol.I, pp. 51, 73, 74) The court then held a joint hearing on both motions. (R.pp. 78-83) Although both the Petition and the Motion were reconsidered after a full hearing, both were ultimately denied. (R. Vol.I, pp. 83, 84) The denial of the Petition for Mental Examination has already been examined and affirmed. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

After the motion and petition were presented, Mr. Davis was questioned. He stated that a California court had sent him to see a Dr. Dean in May of 1972. (R.Vol.I, p.74) Davis explained

that he went to see Dr. Dean in order to meet the terms of probation on an assault and battery charge. (R.Vol.I, p.75)

Mr. Davis explained further that it was necessary for him to see Dr. Dean in order to satisfy requirements for the purpose of obtaining custody of his children. (R.Vol.I, p.76) He further stated that he and his wife had, in fact, been given approval of Dr. Dean and had obtained custody of the children. (R.Vol.I, p.76-77) Mr. Davis also testified that Dr. Dean had certified that Mr. Davis no longer needed treatment. (R. Vol.I, p.77)

Davis did state that he had a drinking problem. (R.Vol.I, p.77) He also admitted that he had many previous criminal arrests and convictions. (R.Vol.I, p.78). It should be noted that during both this hearing and the sentencing hearing Mr. Davis answered questions alertly and rationally. (R.Vol.I, pp.79, 257, 258) At no point

did his attorneys allege that he had been unable to help them in preparing his trial defense.

There was much testimony in both the hearing and at trial which brought out fully all the particulars of the report of Dr. Dean. (R.Vol.I, pp. 73, 76, 77, 200, 206, 207, 208).

After the denial of Motion for Continuance, the trial commenced under Davis' pleas of not guilty and not guilty by reason of insanity. (R. Vol.I, pp. 7, 84) There was testimony concerning the mental condition of Mr. Davis and defense attorneys were allowed to question state's witnesses, including the Alabama relatives of Mr. Davis, and a defense witness, about the mental condition of Mr. Davis. (R.Vol.I, pp.130, 194, 195, 198, 200, 202, 205, 207, 232, 280). Officer G. O. Buckelew stated that his investigation revealed that Davis had been treated for alcoholism in California. (R.Vol.I, p.200) This officer also testified that his investigation showed no mental problems,

except alcoholic problems, all the way through his report. Officer Buckelew also stated that a report written in February, 1973 stated that Dr. Dean did not consider the defendant to be in need of psychotherapy. (R.Vol.I, p.207, 208)

The state trial court judge very ably instructed the jury on all lesser included offenses in a first degree murder charge and on the plea of not guilty by reason of insanity. (R.Vol.I, pp.240, 241, 244-247) For a further summary of facts, see Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 53, L.Ed.2d 275 (1977).

REASONS FOR GRANTING THE WRIT

I.

IMPORTANT QUESTION OF FEDERAL JURISDICTION, PRACTICE AND PROCEDURE

THE COURTS BELOW HAVE SUA SPONTE DECIDED ISSUES NOT RAISED BY DAVIS THUS VIOLATING ACCEPTED STANDARDS OF FEDERAL JURISDICTION, PRACTICE AND PROCEDURE.

In both the majority and the dissenting opinions the Court of Appeals for the Fifth Circuit concluded that the denial, by the state trial court judge, of the motion for a continuance did not deprive Davis of effective assistance of counsel. Davis v. Alabama, 596 F.2d 1214, 1217, 1226 (5th Cir. 1979). It is clear, as stated in the dissenting opinion, "that was the only question remanded to the district court". Davis, 596 F.2d at 1228. It is equally clear that

such issue was the only issue raised by Davis which was not disposed of in the first appeal of this case. Davis v. Alabama, 545 F.2d 460, 466 (5th Cir. 1977). Yet, the majority, after disposing of this issue, proceeds to determine that Davis' trial attorneys were indeed ineffective and remands the case a second time for a hearing "on the single question of whether the attorneys' conduct prejudiced Davis". Davis, 596 F.2d at 1223.

In his dissenting opinion, Davis, 596 F.2d at 1226, 1228, Judge Skelton very ably states:

> "We held that the contention of the petitioner in this regard raised a substantial claim of ineffective assistance of counsel, but it was tied to the action of the trial judge in denying the motion for continuance as shown by the remanded order. We did not decide this issue, but remanded the case to the district court

by issuing the following order:

'Accordingly, we remand this part of the complaint to the district court to determine if denial of the continuance deprived petitioner of effective assistance of his counsel.

'Affirmed in part, reversed in part.'

545 F.2d 467 . . .

. . .All of the members of the panel on this appeal agree that the trial judge is not to be faulted for denyint the motion, and his action in that regard was proper. Accordingly, since the denial of the motion was proper, it could not and did not, as a matter of law, deprive the petitioner of the effective assistance of counsel. That was the only question remanded to the district court. It

has been answered by that court in the negative. The finding and conclusion of the district court, together with our view that the denial of the motion was proper, should end the matter."

The State of Alabama agrees that this holding should have ended this matter. Federal courts have long recognized that orderly judicial procedure normally precludes an appellant from raising on appeal issues not reasonably within the scope of the question presented for habeas corpus. Covington v. Harris, 419 F.2d 617 (D.C. 1969). The State of Alabama respectfully submits that more than orderly judicial procedure requires the federal courts to refrain from raising and deciding issues sua sponte. The action of the court below in deciding an issue not raised by Davis and not considered in its opinion before remand has clearly violated accepted standards of federal jurisdiction, practice and

procedure and presents an important federal question which should be decided by this Honorable Court.

II.

A NOVEL QUESTION

THE FEDERAL WRIT OF HABEAS CORPUS SHOULD NOT BE AVAILABLE TO STATE PRISONERS TO REVIEW MERE ERRORS OR OMISSIONS BY DEFENSE ATTORNEYS WHERE THERE IS NO STATE ACTION.

This Honorable Court has never directly addressed the question of whether Federal Habeas Corpus, under 28 U.S.C. 2254, is available to state prisoners whose claims of ineffective assistance of counsel are based on mere errors or omissions of their attorneys - retained or appointed - where there is no state action.

The petitioner recognizes the basic constitutional right of an indigent accused to have effective counsel. Competent counsel who are

licensed members of the bar must be appointed in a timely manner. However, at some point the state must relinquish control in order to protect and give credence to the attorney-client relationship. Absent "grossly deficient" behavior by counsel, there should be no further duty for state action. See Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975), cert. denied 422 U.S. 1011, 45 L.Ed.2d 675, 95 S.Ct. 2636 (1975). "The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." American Bar Association Project for Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §5.2(b) (tent. draft 1970).

The problems of using Habeas Corpus to review mere errors or omissions by defense attorneys

fall into two categories - practical and legal.

The legal problems arising from using habeas corpus to review alleged errors or omissions by defense counsel in state cases relate to the question of state action. The Court of Appeals for the Fifth Circuit has itself recognized that a mere error or omission of counsel is not actionable under 28 U.S.C. 2254 unless there is some state action involved. Fitzgerald; Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975), cert. denied, 423 U.S. 990, 46 L.Ed.2d, 96 S.Ct. 403 (1976); Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975), 423 U.S. 1019, 46 L.Ed.2d, 96 S.Ct. 455 (1976). A private attorney - retained or appointed - is not a state official. He is not under the direct supervision of state officials. To provide such supervision it would be necessary for the State to somehow enter the confidential attorney-client relationship and to place restraints and mandates on private attorneys. Even if such procedure could pass constitutional muster, it would

totally undermine our adversary system of justice.

In the case sub judice the Court of Appeals has found no state action. Indeed, the trial court judge has been held blameless. In Davis v. Alabama, 596 F.2d at 1217 the Court of Appeals held:

> Instead of blaming the judge we hold that Davis's trial attorneys were responsible for the inadequacy of Davis's defense.

Without regard to such finding, the Court of Appeals either presumed other state action or found none to be necessary and summarily decided under the standard of "reasonably likely to render and rendering reasonably effective assistance" that counsel was ineffective and remanded to the district court for a hearing to determine whether Davis was prejudiced by the conduct of his attorneys.

State action cannot be presumed. It must involve more than mere knowledge. If mere

knowledge were sufficient then every time state or local officials learned of a crime in progress, the crime would become state action. Clearly, state action requires as a condition precedent that the state or its officials be in a position to control events. Otherwise, the state would be at the mercy of persons and things beyond its control.

In Estelle v. Gamble, 429 U.S. 97, 50 L.Ed. 2d 251, 97 S.Ct. 798 (1976) this Honorable Court held that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner". The State of Alabama submits that, by way of analogy, legal malpractice does not become a constitutional violation merely because the client is an accused absent some showing of state action.

The practical problems are numerous. The main difficulty is in identifying an error or omission at the time when something corrective

can be done. What appears to be an error or omission by counsel may be the result of a strategic decision or the result of a decision by the accused or simply a blunder.

This Honorable Court has recognized that what may appear to be errors, may in reality be tactical decisions. Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976). Examples of this abound. For example, a failure of defense counsel to object to a confession may be an error or it may be the result of a strategic decision based on one or more of the following: (1) the accused has chosen not to testify; (2) the confession, while incriminating, puts the accused in a better light than the rest of the state's evidence; or (3) the confession is the accused's only opportunity to get his story before the jury. For another example, see Taylor v. State, 291 Ala. 756, 287 So.2d 901 (1973), cert. denied 416 U.S. 945, 40 L.Ed.2d 298, 94 S.Ct. 1955.

There are other practical problems. It is most difficult for trial judges and prosecutors to detect errors and sort them out from strategy and the demands of the accused. Since there is no time limit on habeas corpus, petitions may be filed years after the trial when defense attorneys may or may not recall why they did or did not do something. Other remedies are more timely.

This Honorable Court has recognized that there are Federal Questions for which habeas corpus is an inappropriate remedy. Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976). The petitioner respectfully submits that questions relating to alleged errors of defense attorneys, where there is no state action, assuming that these are Federal Questions, are among the issues for which habeas corpus is not an appropriate remedy.

In order to suppress crime, criminal justice must be swift and certain. States must, however, accord accused persons due process of law.

If criminal justice is to be certain, the requirements of due process must be such that state officials can, by exercising reasonable diligence, follow them in every case. The State, because of the nature of our adversary system, cannot control all actions of defense attorneys. In the view of the Court of Appeals, tactical decisions of defense counsel arising from the attorney-client relationship can wipe out the diligent efforts of the legislature, judiciary and prosecutors to meet due process requirements. It is the duty of a defense attorney to avoid having a final conviction entered against his client. Why should a defense attorney work with diligence to protect his client's rights, when he can better serve his client by being negligent?

For all of the foregoing reasons, the State of Alabama respectfully submits that Federal Habeas Corpus under 28 U.S.C. 2254 should not be available to state prisoners to review mere errors

or omissions where there is no state action even when such issue is appropriately raised by a state prisoner.

III.

CONFLICT OF DECISIONS

THE EFFECTIVENESS OF COUNSEL SHOULD BE JUDGED BY THE STANDARD OF "REASONABLY LIKELY TO RENDER AND RENDERING REASONABLY EFFECTIVE ASSISTANCE".

Assuming for the sake of argument that the scope of review of the Court of Appeals was sufficiently broad to include the issue decided and that state action either was not necessary or was necessary and present, the Court of Appeals' holding that petitioner's counsel were ineffective is in conflict with MacKenna v. Ellis, 280 F.2d 592, (5th Cir. 1960), modified 289 F.2d 928 (5th Cir. 1961), cert. denied 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 1978 (1961). The standard of the Fifth Circuit by which the effective assistance

of counsel is to be determined is set forth at page 599 in MacKenna, as follows:

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

This standard has often received approval since that date. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); Haggard v. Alabama, 550 F.2d 1019, 1023 (5th Cir. 1977).

Furthermore, Judge Skelton in the dissenting opinion in Davis, 596 F.2d at 1230, points out:

> "The 'effective assistance of counsel' cases relied on by the majority are distinguishable on the facts from the instant case. Those cases, without discussing them in detail, have, for the most part, a common characteristic

or thread running through them, namely, the fact that trial counsel conducted no investigation at all, or, more commonly, failed to investigate specific leads furnished by their clients that were germane to their defenses."

Among the cases cited by the majority are Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967) in which trial counsel unlike counsel for Davis, raised absolutely no issue as to appellant's mental condition in any respect. In Greer v. Beto, 379 F.2d 923 (5th Cir. 1967) counsel failed to offer any testimony on the question of sanity.

In the instant case, unlike those cited by the majority, it is clear that defense counsel has done much more than, as the majority says, "put on only the shell of an insanity defense". Davis, 596 F.2d at 1215. The majority consistently refers to Davis' "relatives in California" and totally ignores the fact that many of Davis'

relatives resided in the Cullman area, were witnesses at the trial, and were, in fact, questioned by defense counsel with regard to the issue of insanity. (R.Vol.I, pp. 130, 194, 195, 198, 200, 202, 205, 207; R.Vol.II, pp. 27, 62, 63).

Judge Skelton in his dissent at page 1228 notes that Davis twice expressed satisfaction with his attorney's representation. The record shows that both defense counsel, unlike defense counsel in authorities cited by the majority, were very active in his defense. Evidence from the report of Dr. Dean was thoroughly considered at the state trial court level as there was much testimony in both the hearing and at trial which brought out his report. (R.Vol.I, pp. 73, 76, 77, 200, 206, 207, 208) The report indicated simply that Davis had been treated for alcoholism in California and that as of February 1973 Davis was no longer in need of psychotherapy. The record also reflects that Davis' attorneys cross-examined state's witnesses extensively.

Petitioner's present attorney did not claim at the evidentiary hearing nor did he claim in brief that petitioner's trial attorneys were at fault. (R.Vol.p. I 338). Before trial, defense counsel made numerous motions including a Petition for Mental Examination. (R.Vol.I, p. 51) They called Davis to the stand to testify during a hearing on this motion. (R.Vol.I, pp. 73-83) Davis' testimony at this hearing revealed only that he had been treated for problems relating to alcoholism and that he had, prior to coming to Alabama, been released from further treatment. (R.Vol.I, pp. 76-78) The denial of this Petition has been previously approved. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

At the conclusion of the evidence, Davis' attorneys made arguments to the jury in his behalf on the issue of insanity. They requested written charges on the special plea not guilty by reason of insanity which were ably covered by the court

in its oral charge. (R.Vol.I, pp. 244-247) It is readily apparent that co-counsel could have done nothing more to be of effective assistance to their client.

Judge Skelton in the dissent at pages 1229 and 1230 also reaches this conclusion after cataloging the actions of trial counsel. In Davis, 596 F.2d at 1229, Judge Skelton writes:

> "The foregoing efforts on the part of trial counsel show that they rendered reasonably effective assistance of counsel on the insanity issue, which seems to be the only issue troubling the majority. This is especially true in view of the holding of another panel of this court in the prior appeal, as quoted above, which is binding on us, that:
>
> (1) Petitioner had no history of irrational behavior.

(2) Dr. Dean's report negated any suggestion of incompetency.

(3) Lay witnesses testified he did not act irrationally or seem incoherent shortly after the crime and while confined in jail.

(4) Petitioner's demeanor when he testified at the hearing on the § 425 motion showed he was able to recite with great particularity and understanding facts concerning his family and his criminal record. There was no indication of incompetency.

(5) There was no evidence that he acted incompetently at his trial.

(6) The trial court did not err in dismissing petitioner's habeas petition which called into

question his competency.

545 F.2d 464, 465.

The majority opinion unnecessarily expands and enlarges the doctrine of 'effective trial counsel.' A defendant is not entitled to 'errorless counsel', but only to counsel 'reasonably likely to render and rendering reasonably effective assistance.'"

When the actions of Davis' counsel are judged by the MacKenna standard of "reasonably likely to render and rendering reasonably effective assistance", it is certain that their actions, under the circumstances of the case sub judice, were more than sufficient to pass the test.

The State of Alabama submits that faced with defending a client who by all accounts was undeniably guilty of murdering his wife (Davis, 596 F.2d at 1215), defense counsel, in presenting a defense of not guilty by reason of insanity with knowledge which inevitably led to the conclusion that Davis'

troubles related only to the consumption of alcohol and that he had been certified as no longer needing treatment, discharged every duty owed to their client.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion, decision and judgment of the Honorable United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

CAROL JEAN SMITH
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Carol Jean Smith, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this_____day of October, 1979, I did serve the requisite number of copies of the foregoing Petition for Writ of Certiorari on B. Don Hale, Esq. whose address is 316 2nd Ave., SW, Cullman, Alabama 35055, attorney for Respondent, by mailing said copies to him at the aforesaid address with first class postage prepaid.

CAROL JEAN SMITH
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS:

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
205-834-5150